IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 59

Originating Summons No 975 of 2020

Between

(1) Syed Suhail Bin Syed Zin
(2) Gobi A/L Avedian
(3) Datchinamurthy A/L Kataiah
(4) Moad Fadzir Bin Mustaffa
(5) Hamzah Bin Ibrahim
(6) Iskandar Bin Rahmat
(7) Lingkesvaran Rajendaren
(8) Norasharee Bin Gous
(9) Nazeri Bin Lajim
(10) Saminathan Selvaraju
(11) Rosman Bin Abdullah
(12) Roslan Bin Bakar
(13) Masoud Rahimi Bin Mehrzad
(14) Zamri Bin Mohd Tahir
(15) Pannir Selvam A/L Pranthaman
(16) Fazali Bin Mohamed
(17) Rahmat Bin Karimon
(18) Tan Kay Yong
(19) Ramdhan Bin Lajis
(20) Jumaat Bin Mohamed Sayed
(21) Tangaraju s/o Suppiah
(22) Muhammad Faizal Bin Mohd Shariff

… *Plaintiffs*

And

(1) Attorney-General
(2) Superintendent of Changi Prison (Institution A1)

… *Defendants*

JUDGMENT

[Administrative Law] — [Rights and liabilities of public servants]
[Civil Procedure] — [Discovery of documents] — [Application]
[Civil Procedure] — [Interrogatories] — [Application for leave]

TABLE OF CONTENTS

Syed Suhail bin Syed Zin and others
v
Attorney-General and another

[2021] SGHC 59

General Division of the High Court — Originating Summons No 975 of 2020
See Kee Oon J
18 January 2021

16 March 2021 Judgment reserved.

See Kee Oon J:

Introduction

1 The Plaintiffs are 22 inmates of Changi Prison who have been sentenced to suffer death. The 1st to 11th Plaintiffs initiated the present Originating Summons ("the OS") under O 24 r 6(1) and O 26A r 1(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules") in order to obtain pre-action discovery and leave to serve pre-action interrogatories. The Attorney-General ("the AG") is named as the 1st Defendant and the Superintendent of Changi Prison (Institution A1) ("the Superintendent") is named as the 2nd Defendant. The 12th to 22nd Plaintiffs were subsequently added as Plaintiffs to the current application by consent of the parties.[1]

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[1] 2nd affidavit of Mr M Ravi dated 1 December 2020; Registrar's Directions for HC/SUM 5265/2020 dated 4 December 2020

Background

2 Mr Gobi A/L Avedian and Mr Datchinamurthy A/L Kataiah are the 2nd and 3rd Plaintiffs in the present proceedings. They had previously jointly filed a separate application for judicial review which led to a hearing before the Court of Appeal in *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 ("*Gobi (JR)*").

3 In *Gobi (JR)*, the 2nd and 3rd Plaintiffs had appealed against the decision of the High Court to dismiss their applications, the substance of which is not material to the current case. During the course of the proceedings before the Court of Appeal, it was observed by the Court that the Singapore Prisons Service ("SPS") had copied and forwarded to the Attorney-General's Chambers ("AGC") certain correspondence between the 2nd and 3rd Plaintiffs and their lawyers and families ("the prisoners' correspondence"). The Court noted that while Regulation 127A ("reg 127A") of the Prisons Regulations (Cap 247, 2002 Rev Ed) ("the Regulations") allowed the SPS to make copies of the prisoners' correspondence to fulfil its administrative role of screening and recording letters, reg 127A did not permit the SPS to forward such correspondence to the AGC,[2] and the AGC had to obtain the prisoner's consent or an order of Court if it wished to obtain copies of such correspondence.[3] That being the case, the Court observed that the AGC as guardian of the public interest had a duty to safeguard the rights of prisoners in the custody of the SPS. However, the Court also accepted that the incident had ultimately resulted due to an oversight on the

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2 *Gobi (JR)* at [88]–[89]

3 *Gobi (JR)* at [91]

part of the AGC and was not an attempt to seek an advantage in the proceedings.[4]

The present OS

4 The Plaintiffs commenced the OS to obtain discovery of the letters between the AG and the Superintendent concerning the AG's requests for copies of the correspondence between the Plaintiffs and their lawyers and families ("the Plaintiffs' correspondence"), as well as copies of the Plaintiffs' correspondence forwarded to the AG by the Superintendent, together with any enclosures thereto. The Plaintiffs also sought leave to serve pre-action interrogatories on the AG with a view to, *inter alia*:[5]

(a) identify the persons who had requested for the Plaintiffs' correspondence to be forwarded to the AG;

(b) identify the persons who had forwarded the Plaintiffs' correspondence to the AG;

(c) identify the dates the requests or responses above were made; and

(d) identify the persons to whom any disclosures of the Plaintiffs' correspondence were made.

5 The Plaintiffs had contemplated commencing the following legal proceedings against the AG and/or its officers or agents:[6]

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4 *Gobi (JR)* at [93]

5 Annexure of Interrogatories to the 1st affidavit of Mr M Ravi dated 1 September 2020 ("Mr Ravi's 1st affidavit")

6 Mr Ravi's1st affidavit at para 8; Reply Submissions of the Plaintiffs at para 4.3(iii)

(a) declaratory relief that their actions were *ultra vires*;

(b) a tortious claim and/or disciplinary proceedings premised on a breach of professional duties and a duty of care to safeguard the Plaintiffs' rights;

(c) a tortious claim and/or disciplinary proceedings for a breach of statutory duties under the Prisons Act (Cap 247, 2000 Rev Ed) ("the Prisons Act") or the Regulations;

(d) a tortious claim for misfeasance in public office; and

(e) damages for harm caused to the Plaintiffs by the abovementioned breaches.

6 Two categories of claims were therefore contemplated by the Plaintiffs. The first was an application for judicial review of the Defendants' conduct, and the second was a tortious claim for damages. The Plaintiffs contend that they are unable to commence the legal proceedings mentioned in [5] above as they are unable to identify the individual public servants who had been involved, and are unable to ascertain the extent of the harm caused to them as they lack the documents listed in [4] above.[7]

7 The AG's primary argument is that the Plaintiffs have no basis to request either pre-action discovery or pre-action interrogatories against the Government.[8] In the alternative, pre-action discovery and pre-action interrogatories should not be ordered in the present case as they are neither

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7 Mr Ravi's 1st affidavit at para 24-26

8 1st affidavit of Mr Hri Kumar dated 18 November 2020 ("Mr Kumar's 1st affidavit") at para 4-5

relevant nor necessary.[9] Notwithstanding the AG's position and the arguments which were put forth, the AG voluntarily disclosed all the correspondence received from the SPS in the interests of transparency.[10] It was also not disputed that no correspondence was sought by the AG or forwarded to it by the SPS in respect of the 4th, 7th, 8th, 9th, 16th, 17th, 20th, 21st, and 22nd Plaintiffs.[11]

8 In response, the Plaintiffs argue that the AG has incorrectly asserted that applications for pre-action discovery or pre-action interrogatories are not available against the Government,[12] and that the applications are necessary and relevant for the Plaintiffs to obtain sufficient information for the purposes of their contemplated claims against the AG and/or its officers or agents. The Plaintiffs submit that it is in the interests of justice and fairness that public officers who have acted unlawfully or in breach of their statutory duties, or committed misconduct in public office, ought to be held to account, and not given any special privilege of having their identities shielded.[13] Nevertheless, after the voluntary disclosures made by the AG identifying the affected Plaintiffs, the Plaintiffs no longer seek discovery or interrogatories in respect of any contemplated declaratory relief or prerogative remedies. They now only seek information relating to their contemplated claims in tort.[14]

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9 Mr Kumar's 1st affidavit at para 6; Written Submissions of the AG at para 41

10 Mr Kumar's 1st affidavit at para 16; 2nd affidavit of Mr Hri Kumar dated 16 December 2020 ("Mr Kumar's 2nd affidavit") at para 4

11 Written Submissions of the Plaintiffs at para 3.1

12 Written Submissions of the Plaintiffs at para 4.3-4.8; Reply Submissions of the Plaintiffs at para 6.1-6.4

13 Written Submissions of the Plaintiffs at para 5.1-5.6; Reply Submissions of the Plaintiffs at para 5.1-5.13 and 8.3

14 Written Submissions of the Plaintiffs at para 4.3-4.4

9 With regard to the Superintendent who had been named on the OS, at the start of the hearing of the current proceedings on 18 January 2021, it was agreed between parties that the Superintendent ought not to have been joined as a party to these proceedings. It was therefore ordered by consent that the Superintendent be removed as a party under O 15 r 6(2)(a) of the Rules.

Issues to be determined

10 There are four key issues that arise before me in this OS. First, who would be the proper parties in the contemplated proceedings by the Plaintiffs, and accordingly whether pre-action discovery or pre-action interrogatories can be ordered to identify these parties. Secondly, assuming that the proper parties were brought into the proceedings, whether pre-action discovery or pre-action interrogatories can be ordered against the Government. Thirdly, assuming that pre-action discovery or pre-action interrogatories can be ordered against the Government, whether the present applications ought to be granted. Fourthly, whether the Plaintiffs are able to obtain pre-action discovery or pre-action interrogatories in contemplated disciplinary proceedings.

Who are the proper parties in the contemplated proceedings

11 As a preliminary point, I will first address the Plaintiffs' argument that public officers should not be given the "special benefit of being shielded from litigation in cases of personal wrongdoing which is not afforded to ordinary members of the public."[15] The Government Proceedings Act (Cap 121, 1985 Rev Ed) ("GPA") is derived from the UK Crown Proceedings Act 1947 (c 44) (UK) ("CPA 1947"), as applied to Singapore in 1965 when Singapore was still part of Malaysia (see *Re Fong Thin Choo* [1991] 1 SLR(R) 774 at [16]). Prior

[15] Reply Submissions of the Plaintiffs at para 8.3

to the enactment of the CPA 1947, the prevailing practice was for the relevant government body to appoint a nominee defendant in the eventuality of any tortious actions against the Government (see *Adams v Naylor* [1946] AC 543 at 549-550, *per* Viscount Simon). With the enactment of the CPA 1947, claims in tort or contract could be brought directly against the Government. The stated aim of the CPA 1947 was to deal with the very situation where either there was a question as to whether the identified public officer was acting on his own, or where the particular wrongdoer cannot be identified (see United Kingdom, House of Lords, *Parliamentary Debates* (4 March 1947), vol 146, col 63–64, *per* The Lord Chancellor Viscount Jowitt).

12 The CPA 1947 represented "a radical change in the [government's] liability in tort, but it does not altogether dispense with a knowledge of the older principles" (see Glanville Williams, *Crown Proceedings: An Account of Civil Proceedings by and against the Crown as affected by the Crown Proceedings Act 1947* (Stevens & Sons, 1948) at p 16). This point was also echoed by Byron CJ of Grenada, who stated *obiter* that the purpose of the CPA 1947 "was to make it easier for the Crown to be a party to litigation. It was intended to facilitate, not restrict, the right of the citizen to gain redress against the government" (see *Gairy and another v Attorney General of Grenada* [2001] 1 LRC 119 at [11]). Although Byron CJ's decision was eventually overturned by the Privy Council in *Gairy and another v Attorney General of Grenada* [2002] 1 AC 167 on another ground, his observation on the ambit of the CPA 1947 was left undisturbed. Accordingly, the GPA which finds its roots in the CPA 1947 does not in and of itself preclude the Plaintiffs from instituting civil proceedings against the individual public officers who may be involved. In fact, it can be said that public officers by circumstance of their very positions are accountable to the public and bound to be subject to public scrutiny.

13 Reverting to the arguments in the present case, the Plaintiffs may be justified in submitting that the GPA does not allow the Government to shield public officers from scrutiny, much less to permit them to act in disregard of the rule of law. I do not understand the AG to be taking issue with these propositions. But it is quite another matter to translate them into a general right to commence civil proceedings against any individual public officer under any circumstances. It is patently clear that unless the public officers' actions have been disavowed by the Government, the GPA provides that the Government is vicariously liable for the tortious acts of its officers.

14 The AG argues correspondingly that in line with *Chee Siok Chin v Minister of Home Affairs* [2006] 1 SLR(R) 582 at [23], "all civil proceedings against the Government and/or public office holders have to be commenced against the AG pursuant to s 19(3) of the GPA."[16] The Plaintiffs, however, argue that the AG's refusal to accept liability would mean that the Plaintiffs have to try and find recourse against the public servants personally,[17] who could be liable if their actions were considered to have been conducted in bad faith.[18]

15 Section 19(3) of the GPA states:

> Civil proceedings against the Government shall be instituted against the appropriate authorised Government department, or, if none of the authorised Government departments is appropriate or the person instituting the proceedings has any reasonable doubt whether any and if so which of those departments is appropriate, against the Attorney-General.

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16 Written Submissions of the AG at para 44

17 Written Submissions of the Plaintiffs at para 4.7

18 Reply Submissions of the Plaintiffs at para 4.3

16 As no list of Government departments that have been authorised for the purposes of the GPA has been published to date in the Gazette under s 19(1) of the GPA, all civil proceedings against the Government and/or public officers have to be commenced against the AG. Under s 5 of the GPA, it is further provided that the Government is liable in tort for any acts or omissions committed by any public officer, although the scope of this liability extends only in so far as the public officer was acting or purporting in good faith to be acting in pursuance of a duty imposed by law.

17 In my view, the law on this issue is well-settled in the Court of Appeal judgment in *AHQ v Attorney-General* [2015] 4 SLR 760. Chao Hick Tin JA stated at [31]:

> In Singapore, the general rule is that the Government may be liable for, *inter alia*, the tortious acts of its public officers….Put simply, s 5 of the GPA renders the Government liable for the tortious acts of its public officers in the same manner as would have been the case if the Government were an ordinary employer.

18 It would not be appropriate for this Court to allow the Plaintiffs' applications for pre-action discovery or pre-action interrogatories for the stated purpose of trying to find recourse against the public servants personally, as the GPA already provides clear guidance on the party who may be liable to the Plaintiffs in tort. Furthermore, in the present case, the Plaintiffs have not asserted that the relevant public officers were not acting in their capacities as agents of the Government. Indeed, they are unable to do so, given that the factual context would show that the acts in question were carried out by the public officers in the course of acting in their official capacities. Moreover, there is nothing to suggest that the Government has disavowed their actions. Any contemplated action would lie against the Government rather than against the public officers in their personal capacities. That being said, if an element of bad

faith on the part of the public officers can be proved, they may be liable personally, although for the reasons that I will address in due course, this will not provide the Plaintiffs an avenue to obtain pre-action discovery or pre-action interrogatories against the AG at this juncture.

19 I would also note that my observations in the preceding paragraph would have applied to the issue of the Superintendent having been brought in as the wrong party to the current proceedings, had the parties not consented to the Superintendent's removal.

Whether pre-action discovery or pre-action interrogatories can be ordered against the Government

20 As noted by the Court of Appeal in *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 ("*Dorsey James*") at [25]–[26], the principles that underpin both pre-action discovery and pre-action interrogatories are broadly the same, and both applications seek to achieve the same objectives of saving of costs and time, in addition to the efficient management of court processes. For the sake of convenience, I will adopt the same collective nomenclature of "pre-action disclosures" for both applications.

21 In *Dorsey James* at [23], VK Rajah JA described pre-action interrogatories as a unique procedural tool which is peculiar to Singapore and was added to the Rules in 1993 via O 26A r 1, giving effect to the power of the Court to order discovery of facts or documents found in para 12 of the First Schedule to the Supreme Court Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"). In fact, the First Schedule to the SCJA (including para 12) was itself newly added by Parliament via the Supreme Court of Judicature (Amendment) Bill, passed on 12th April 1993.

22 Following from that, the AG submits that as the 1997 amendments to the GPA do not expressly provide for pre-action disclosures, both applications as creatures of statute under para 12 of the First Schedule to the SCJA read with O 24 r 6(1) and O 26A of the Rules, are not available against the Government under s 34 of the GPA.[19]

23 The second argument put forward by the AG is that the Court's power to order discovery or grant leave to serve interrogatories is subject to the limitations in s 34 of the GPA and s 54 of the Interpretation Act (Cap 1, 2002 Rev Ed) ("IA").[20] Accordingly, discovery can only be ordered against the Government where there are "civil proceedings" as defined in s 2 of the GPA,[21] and as the Plaintiffs' application is for pre-action discovery and leave to serve pre-action interrogatories, which occur before proceedings have begun, both applications would not fall within the definition of "civil proceedings".[22]

24 The Plaintiffs, however, argue that pursuant to s 18 of the GPA, civil law procedures apply in exactly the same manner to proceedings against the Government as it does to claims between private citizens.[23] In turn, the Plaintiffs seek to distinguish the case of *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] 3 SLR 796 ("*Pannir Selvam*") on the ground that the case concerned an *ex parte* application for leave for judicial review where the Government was not yet a party to proceedings, in contrast to the present case

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19 Written Submissions of the AG at para 73–76

20 Written Submissions of the AG at para 69

21 Written Submissions of the AG at para 71

22 Written Submissions of the AG at para 80-82

23 Written Submissions of the Plaintiffs at para 5.2

where an originating summons has already been filed and the AG is already a party to proceedings.

25 I will first address the AG's submissions on the effect of the 1997 amendment to s 2(2) of the GPA. Prior to the 1997 amendments to the GPA, the definition of "civil proceedings" was "proceedings of whatever kind of a civil nature before a court and includes proceedings for the recovery of fines and penalties and an application at any stage of a proceeding, but does not include such proceedings as would in England be brought on the Crown side of the Queen's Bench Division". After the amendment, "civil proceedings" are defined under s 2(2) of the GPA as: "… proceedings of whatever kind of a civil nature before a court and includes proceedings for judicial review and recovery of fines and penalties and an application at any stage of a proceeding…"

26 In considering the interpretation of a statute, it is uncontroversial that extraneous material in the form of Parliamentary debates on the Bill containing the legislative provision should be considered, subject to the provisos stated in *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 at [70], that:

(a) the statements had to be clear and unequivocal;

(b) the Court had to guard against the danger of finding itself construing and interpreting the statements made in Parliament rather than the legislative provision; and

(c) the statements should be directed to the very point in question.

27 Turning to the relevant Parliamentary debates, at the Second Reading of the Statutes (Miscellaneous Amendments) Bill (see *Singapore Parliamentary Debates*, *Official Report* (25 August 1997) vol 67, at col 1549), the Minister of State for Law Associate Professor Ho Peng Kee explained:

> …Firstly, provisions in various laws are amended to limit the reception of English laws, practices and procedures into our legal system. At the Second Reading of the Application of English Law Bill in 1993, the Minister for Law indicated that there was a need to review our legislation to identify provisions which still import English Law and practices. The Attorney-General's Chambers have carried out this review. These amendments, set out in the First Schedule, will ensure greater certainty in our laws and put them in a local context…

28 In amending s 2(2) of the GPA, Parliament had plainly sought to amend the GPA by removing the reference to English law and practices. However, it cannot be said that the omission of any reference to pre-action disclosures in s 2(2) of the GPA by itself precludes such applications being made. The enquiry must extend to consideration of s 34(1) of the GPA as well.

29 I turn now to the AG's second submission on the effect of s 34(1) of the GPA and s 54 of the IA. Section 34(1) of the GPA states:

> Subject to and in accordance with Rules of Court —
>
> (a) in any civil proceedings in the General Division of the High Court or a State Court to which the Government is a party, the Government may be required by the court to make discovery of documents and produce documents for inspection; and
>
> (b) in any such proceedings as aforesaid, the Government may be required by the court to answer interrogatories:
>
> …

30 In *Pannir Selvam* at [22], I had accepted the AG's submissions that s 34(1) of the GPA had to be read in accordance with s 54 of the IA, which provides that "[n]o Act shall in any manner whatsoever affect the rights of the

Government unless it is therein expressly provided, or unless it appears by necessary implication, that the Government is bound thereby". Accordingly, I held that the Government was not a party to civil proceedings at the leave stage of judicial review, and that s 34(1) of the GPA applied to preclude any potential order for discovery. Further, in *Pannir Selvam* at [35], I also held that subject to the clear limits stipulated in s 34 of the GPA and s 54 of the IA, the Court should not exercise its inherent powers to order discovery or grant leave to serve interrogatories.

31 In my view, the reasoning I had adopted in *Pannir Selvam* would apply with equal rigour to the current applications for pre-action disclosures, namely, that s 34(1) of the GPA and s 54 of the IA define the limits for discovery against the Government.

32 First, it is clear that no substantive action has been commenced against the Government yet. The OS contains applications seeking specific *pre-action* orders. Both O 24 r 6(1) and O 26A r 1 of the Rules contemplate the fact that both these applications would occur *before* the commencement of proceedings, and not during proceedings. O 24 r 6(1) of the Rules states that "[a]n application for an order for the discovery of documents *before the commencement of proceedings* shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons [emphasis added]". O 26A r 1(1) of the Rules states that "[a]n application for an order to administer interrogatories *before the commencement of proceedings* shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons [emphasis added]". I reiterate that by their very nature and by definition, these are *pre-action* applications.

33 Second, the fact that pre-action disclosures are not conventional civil proceedings is reinforced by the observation of the Court of Appeal in *PricewaterhouseCoopers LLP and others v Celestial Nutrifoods Ltd (in compulsory liquidation)* [2015] 3 SLR 665 at [33], that an application for leave to serve pre-action interrogatories is not an interlocutory application, but rather a "limited" application filed for the specific purpose of obtaining information through the administration of interrogatories and is rendered spent once dealt with by the Court.

34 Third, in Singapore, there is no express provision for pre-action disclosures against the Government in either the Rules or s 34 of the GPA. No contemporaneous amendments to s 34 of the GPA were made when s 2(2) of the GPA was amended in 1997 to remove the references to English law and practices. I pause to note that in the case of *British Union for the Abolition of Vivisection v Secretary of State for the Home Department* [2014] EWHC 43 (Admin) ("*BUAV*"), the English High Court held that the court does have such power to order pre-action disclosures against the Government in judicial review proceedings, in the absence of clear exclusions of the Court's power to do so. While s 28 of the CPA 1947 is *in pari materia* with s 34 of the GPA, this case is not applicable to the current proceedings for two simple reasons. First, the Plaintiffs are no longer seeking pre-action disclosures in respect of judicial review. Second, and more importantly, the Court in *BUAV* had not considered the ambit of the English common law rule that the Government is not bound by any statutory provision unless by express words or necessary implication (see *Lord Advocate v Dumbarton District Council* [1989] 3 WLR 1346 at 1366E, *per* Lord Keith of Kinkel), which is what s 54 of the IA seeks to codify.

35 In *R (Black) v Secretary of State for Justice* [2018] AC 215, a claimant brought judicial review proceedings against the refusal by the Secretary of State

to allow the reporting of smoking breaches within prison compounds, which was otherwise required by the Health Act 2006 (c 28) (UK). The claimant argued that the statute impliedly bound the Crown, or alternatively that the common law rule that a statutory provision did not bind the Crown save by express words or necessary implication should be reformulated or revisited. While stating that there might be a strong case for the UK Parliament to revisit the rule, a unanimous UK Supreme Court chose to uphold the rule on the ground that the rule was so well-established that many statutes will have been drafted and passed on the basis that the Government was not bound except by express words or necessary implication. Instead of abolishing the rule, the UK Supreme Court ultimately chose to clarify the rule, with Lady Hale stating:

> [36] It is certainly open to this court to clarify the test, even if such clarification has the effect of modifying the understanding which some, at least, may have had of it. We can begin with some simple propositions:
>
> (1) The Crown is not bound by a statutory provision except by express words or necessary implication.
>
> (2) This is not an immunity from liability, strictly so-called, but a rule of statutory interpretation.
>
> (3) The goal of all statutory interpretation is to discover the intention of the legislation.
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> (4) That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose.…."A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context" must be modified to include the purpose, as well as the context, of the legislation.
>
> (5) In considering the intention of the legislation, it is not enough that it is intended for the public good or that it would be even more beneficial for the public if the Crown were bound.
>
> (6) However, it is not necessary that the purpose of the legislation would be "wholly frustrated" if the Crown were not bound.…
>
> (7) In considering whether the purpose of the Act can be achieved without the Crown being bound, it is permissible to

> consider the extent to which the Crown is likely voluntarily to take action to achieve it. Inaction cannot be assumed. It may be that the Act's purpose can as well be achieved by the Crown exercising its powers properly and in the public interest. But if it cannot, that is a factor to be taken into account in determining the intention of the legislation.

36 Bearing in mind the principles stated above, it is my view that in the absence of any express provision to the contrary, the effect of s 54 of the IA is that s 34 of the GPA defines and limits the scope of disclosures available against the Government. This is also consistent with O 73 r 10 of the Rules, by which the Court's powers to order either discovery or leave to serve interrogatories against the Government are expressly premised upon s 34 of the GPA.

37 Fourth, in *Pannir Selvam* at [44] and [55], I had highlighted the risk of potentially frivolous applications for discovery even before a *prima facie* case were made out. In my view, if pre-action disclosures could be ordered against the Government, it would conceivably create a situation where it could be easier to obtain information from the Government via pre-action disclosures than via the conventional discovery processes associated with judicial review. Not only would this result potentially open the floodgates to actions seeking pre-action disclosures against the Government, it would also be plainly inconsistent with the holding in *Dorsey James* at [49], that "[p]re-action disclosure, while not exceptional, is not usual." Evidently, the concern over such applications becoming commonplace was one of the reasons why the English High Court in *BUAV* at [56] ultimately declined to exercise its power to order pre-action disclosure against the government authority even though it held that it had the jurisdiction to do so.

38 In summary, the complete scope of disclosures against the Government is governed and limited by what is expressly provided in s 34(1) of the GPA and

s 54 of the IA. Accordingly, pre-action disclosures are excluded from this scope as they are not expressly provided for, and do not fall within the definition of civil proceedings for the purposes of ss 2(2) and 34 of the GPA.

Whether pre-action disclosures may be ordered in the present proceedings

39 Following from my decision that pre-action disclosures are not available against the Government, the Plaintiffs' application necessarily fails. Nevertheless, for completeness, I shall proceed to consider whether on the substantive merits of the Plaintiffs' case, their applications for pre-action discovery and leave to serve interrogatories ought to be granted.

Pre-action discovery

40 It has been established by the Court of Appeal in *Ching Mun Fong v Standard Chartered Bank* [2012] 4 SLR 185 ("*Ching Mun Fong*") at [18], that:

> It would be apparent from O 24 r 6(3) and r 7 that the applicant must satisfy both the requirements of relevance (r 6(3)) and necessity (r 7) to succeed in an application for pre-action discovery. These are two separate and distinct requirements. However, there is a degree of tension in the way these two rules are formulated. Rule 6(3)(a) requires that an applicant possess grounds for making the application as well as the material facts pertaining to an intended claim. Rule 6(3)(b) presupposes that an applicant knows the issues which are likely to arise out of the possible claim in requiring that the relevance of the documents sought to be disclosed be shown. In contrast, r 7 states that discovery is to be ordered only if necessary and this appears to suggest that there is some gap in the knowledge of the applicant which must be filled… [emphasis added]

41 The AG submits that consequent to the Court's observations on O 24 r 6(3)(b) in *Ching Mun Fong*, the Plaintiffs are obliged to demonstrate a clear nexus between the documents and interrogatories sought, and the issues which are likely to arise out of the proceedings they indicate they are

contemplating.[24] In my view, the Court in *Ching Mun Fong* was merely making an observation as to the tensions that exist between O 24 r 6(3)(b) and r 7. The Court in *Ching Mun Fong* went on to state at [23] that:

> …the scheme of pre-action discovery is to accommodate the situation where a potential plaintiff does not have sufficient facts to commence proceedings. This is consistent with its purpose being to allow a potential plaintiff to determine whether he has a "good cause of action". It follows that pre-action discovery is unnecessary where an individual is in a position to commence proceedings…

42 Pre-action discovery was instituted precisely to address a situation where the potential plaintiff has insufficient facts to commence proceedings, and to require the applicant to show a clear nexus between the information sought and the issues that might arise out of potential proceedings would risk defeating the very rationale for pre-action discovery. However, what logically follows is that pre-action discovery is unnecessary when the potential plaintiffs already have sufficient facts to commence proceedings. As observed by Chao Hick Tin JA in *Ching Mun Fong* at [28], to suggest otherwise would "effectively render otiose the provisions for the normal discovery following the commencement of action".

43 In this regard, it is noted that the AG has already made disclosures of all the Plaintiffs' correspondence received by the AGC in addition to disclosing that it had requested and did receive the correspondence of the 1st Plaintiff,[25] as well as the 12th Plaintiff.[26] In addition, it has also been categorically affirmed

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24 Written Submissions of the AG at para 31

25 Mr Kumar's 1st affidavit at para 25

26 Mr Kumar's 2nd affidavit at para 12

that the AG did not "use such correspondence, or otherwise gain any advantage, in any legal proceedings against the Plaintiffs".[27]

44 In my view, the voluntary disclosures made by the AG already provide the Plaintiffs with sufficient documents and information to mount their contemplated claims as they may deem fit, whether for declaratory relief or premised on tort.[28] For the sake of completeness, I will address the Plaintiffs' contemplated claims in tort based on misfeasance in public office, breach of statutory duty, as well as breach of the common law duty of care.

(1) Misfeasance in public office

45 As stated by the Court in *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board and another* [1997] 1 SLR(R) 52 at [138], the tort of misfeasance in public office is in essence an act done by a public officer or public body where:

(a) the act is done maliciously or with the knowledge that it is *ultra vires* the power of the public body;

(b) it is foreseeable that the act would cause damage to the plaintiffs; and

(c) the act actually does cause damage to the plaintiffs.

46 The Plaintiffs are in possession of the material that had been disclosed by the SPS to the AGC and are in a position to know the extent of damage, if any, that they have suffered as a result. Further, as the AG had clarified, there

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27 Mr Kumar's 1st affidavit at para 26; Mr Kumar's 2nd affidavit at para 13

28 Mr Ravi's 1st affidavit at para 8

is no dispute that there can be a cause of action for misfeasance in public office. What is disputed is whether the Plaintiffs have shown that an actionable duty of care exists in relation to their contemplated claim against the AG, its agents or officers.

47 I would make the observation here that in a similar case concerning prison officers who had opened a prisoner's mail in breach of prison rules, the House of Lords had held that the tort of misfeasance in public office was not actionable without proof of material damage, notwithstanding the fact that several of the prison officers were found to have acted in bad faith (see *Watkins v Secretary of State for the Home Department and others* [2006] 2 AC 395 at [26]–[27], *per* Lord Bingham of Cornhill). Even if it is accepted that the Plaintiffs do not have any evidence of malice or knowledge that the act was *ultra vires* on the part of the AG (or its officers), that does not prevent the Plaintiffs from bringing a claim against the AG or asking for discovery of relevant information after commencement of proceedings. As stated in *Ching Mun Fong* at [40], the information in pre-action discovery is to enable the applicant to formulate his/her pleadings, and not for the purpose of allowing the applicant to determine his/her chance of success.

(2) Breach of statutory duty

48 Turning to the Plaintiffs' contemplated claim in breach of statutory duty, the relevant principles may be found in the House of Lords decision in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731, which were endorsed by the High Court in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 at [211] and *MCST Plan No 3322 v Mer Vue Developments Pte Ltd and others (King Wan Construction Pte Ltd and*

others, third parties) [2016] 2 SLR 793 at [123]. Whether a private right of action arises under the statute which was allegedly breached is dependent on whether Parliament intended to impose a statutory duty for the protection of a limited class of the public (to which the Plaintiffs belong), as well as to confer on members of that limited class a private right of action for breach of that duty. That there has been a breach of the relevant provisions in the Prisons Act and the Regulations is not in question, as has been determined by the Court of Appeal in *Gobi (JR)*. However, in order to establish that a private right of action exists for a breach of statutory duty, the Court of Appeal in *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549 has stated at [54]:

> … [T]he party seeking to establish that a private right of action exists for a breach of statutory duty must show that Parliament, in imposing the statutory duty in question to protect the members of a class, intended those members to have such a right of action. Here, it must also be borne in mind that such right is not immediately established just because a statute is intended to protect a particular class of persons. Ordinarily, something more is required to demonstrate a statutory intention to confer a private right of action. In matters where the statute's objective is to protect the public in general, exceptionally clear language will be required before an intention to confer a private remedy for a breach of statutory duty can be established…

49 With reference to the second limb of the tort, the Plaintiffs accept that whether the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA"), the Legal Profession (Professional Conduct Rules) 2015 (Cap 161, S 706/2015) ("PCR"), the Prisons Act or the Regulations would give rise to a private right of action is a question yet to be determined by the courts.[29] In this regard, I do not see how establishing the identities of involved public officers or their purported intentions in their confidential communications would be necessary and useful to the Plaintiffs for the purpose of formulating their claim or for supporting their

[29] Reply Submissions of the Plaintiffs at para 5.1

contention that a "private law cause of action" does exist. In any event, the Plaintiffs have already been furnished with all the relevant documents and correspondence which had been transmitted to the AGC.

(3) Breach of common law duty of care

50 In the alternative, the Plaintiffs also argue that the AGC's legal officers have breached the common law duty of care based either on statutory duties under the LPA and the PCR[30] or on a general duty to make decisions and conduct themselves with honesty, integrity and in accordance with the law for the benefit of those directly affected by their conduct.[31] These alleged breaches arose by virtue of unlawfully seeking or encouraging the disclosure of the personal or privileged correspondence of the Plaintiffs.[32]

51 It is not the AG's position that the AGC's officers owe no duty to make their decisions with due care, honesty, integrity and in accordance with the law. Nonetheless, the AG contended that the duty of care on the part of the AGC's legal officers only extends to a duty to ensure due and proper administration of justice and that the Plaintiffs' attempt to stretch the extent of the duty of care into a tortious claim against the Government is unprincipled and without authority.

52 It is well-settled that the decision of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") has established the framework for the imposition of a duty of care in negligence

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30 Written Submissions of the Plaintiffs at para 4.5; Reply Submissions of the Plaintiffs at para 5.8

31 Reply Submissions of the Plaintiffs at para 5.3

32 Reply Submissions of the Plaintiffs at para 5.7

claims in Singapore. This is a two-stage test comprising of, first, proximity and, second, policy considerations, preceded by the threshold question of factual foreseeability. In this connection, Professor Gary Chan has observed that it would not be inconsistent with the *Spandeck* framework to impose a duty of care on the basis of statutory duties (Gary Chan, "*Finding common law duty of care from statutory duties: All within the Anns framework*" (2016) Tort Law Review 24(1) 14). If this same argument is applied, having regard to the AG's acceptance that its legal officers do owe a duty to ensure the due and proper administration of justice, it may be arguable that a duty of care may arise under the *Spandeck* framework. This possibly finds some support in *TV Media Pte Ltd v De Cruz Andrea Heidi and another appeal* [2004] 3 SLR(R) 543, where the Court of Appeal opined *obiter* at [68] that a government body could possibly be held liable in negligence for breach of its statutory duties. Nevertheless, the weight of the common law authorities suggests that a duty owed to the public at large does not extend to a private law duty of care owed to individual members of the public (see *Michael and others v Chief Constable of South Wales Police and another (Refuge and others intervening)* [2015] AC 1732 at [114]-[116], [128], *per* Lord Toulson JSC).

53 I should clarify that my observations above on a possible duty of care owed by the legal officers of AGC premised on the *Spandeck* framework are tentative at best. Full arguments were not canvassed before me and apart from *Spandeck*, none of the authorities I have mentioned in the preceding paragraph were cited. In any event, and as the AG has rightly submitted and the Plaintiffs agree,[33] this is not an issue that has to be determined at this juncture. As I have noted at [44] above, the Plaintiffs are already able to mount their tortious claims,

[33] Reply Submissions of the Plaintiffs at para 5.8

whether in negligence or otherwise, and I would thus arrive at the same conclusion that it is neither necessary nor relevant to identify the individual public officers.

Pre-action interrogatories

54 In *Dorsey James*, VK Rajah JA held at [47] that:

> As such, beyond the obvious threshold of relevance, it is clear that *necessity* (as set out in O 26A r 2) remains the main cornerstone in determining whether pre-action interrogatories will be ordered: are the pre-action interrogatories applied for necessary for the claimant to ascertain if his cause of action is *viable*? The jurisdiction by its very nature requires the court to acknowledge that some measure of imprecision in mapping out factual contours is permissible. Yet, at the same time it must be borne in mind that this jurisdiction cannot be overstretched to allow claimants to sniff around for potential causes of action which are still at an amorphous, undefined stage. Nor can the procedure be employed for collateral reasons that suggest the commencement of proceedings is not the key consideration that underpins the relevant application. As much as O 26A r 1(3)(*b*) states that reference to "any pleading served or intended to be served in the proceedings" should be made only "if practicable", we would only make the obvious observation that the clearer the cause of action that a claimant is able to put before the court, the easier it is to ascertain the relevance and necessity of the pre-action interrogatories to those proceedings. In other words, the claimant's "real interest" (*per* Lord Wilberforce in *British Steel* at 1173F) in suing the parties on whom information is sought about must be made apparent to the court, and is always a highly relevant consideration. [emphasis in original]

55 In *Dorsey James* at [78], the Court declined to order pre-action interrogatories on the ground that they were not necessary as there already was a complete cause of action which the applicants could choose to pursue, stating that "pre-action interrogatories are by nature intrusive, and should only be ordered when it is clearly just to do so." In my view, as I had earlier explained, the Plaintiffs may potentially have a cause of action against the Government through a civil action filed against the AG. For the same reasons set out above,

I do not see how the Plaintiffs' pre-action interrogatories which are meant to identify individual public servants for the purpose of individual liability are either necessary or relevant.

Disclosure of privileged documents and contemplated disciplinary proceedings

56 Finally, I briefly address the Plaintiffs' arguments that the AGC's legal officers had breached rules of litigation privilege,[34] yet the Plaintiffs lack the necessary information to make complaints against the individual public officers for the purpose of initiating disciplinary proceedings.[35] It was argued before me by the AG that pre-action disclosures only apply to civil proceedings and not to disciplinary proceedings which are quasi-criminal in nature.

57 In *Then Khek Khoon and another v Arjun Permanand Samtani and another* [2012] 2 SLR 451 ("*Then Khek Khoon*"), in a dispute over the quantum of damages to be paid, the defendant sought an order to restrain the plaintiff's solicitors on the ground that the plaintiff's solicitors who had prepared certain invoices would be in breach of the relevant rules against conflicts of interest in the PCR. Quentin Loh J (as he then was) dismissed the application on the ground that the proper forum for investigating and determining an alleged breach of the PCR was the Law Society rather than the court, unless the breach triggered a concurrent breach of legal obligations owed by counsel to the court or to the client at common law. Loh J went on to further state at [22], that where "matters impinge on the proper administration of justice, due process and wider public interest issues, the court should intervene".

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34 Reply Submissions of the Plaintiffs at para 5.12

35 Reply Submissions of the Plaintiffs at para 4.3(iii)

58 While I accept that in the present case, the matters at hand involve questions as to the proper administration of justice, due process and wider public interest, it would appear that the intervention Loh J had adverted to in *Then Kek Khoon* was in the context where the trial or substantive matter had yet to be litigated. That is not the case here, as the Plaintiffs' respective trials and appeals have been heard and concluded before the appropriate fora.

59 In my view, the proper forum for the disciplinary proceedings alluded to by the Plaintiffs is the Law Society's Disciplinary Tribunal, and the prescribed procedure can be found in the Legal Profession (Disciplinary Tribunal) Rules (Cap 161, R 2, 2010 Rev Ed). Furthermore, as stated by VK Rajah JA in *Low Chai Ling v Singapore Medical Council* [2013] 1 SLR 83 at [29], "[a]s disciplinary proceedings are quasi-criminal in nature, a disciplinary tribunal has to adopt procedures and practices which ordinarily prevail in criminal trials." Accordingly, I agree with the AG that the pre-action disclosures the Plaintiffs seek are not available in the current civil proceedings.

Conclusion

60 For the reasons above, I am of the view that the Plaintiffs are precluded from applying for pre-action discovery and pre-action interrogatories against the AG. Further or in the alternative, I find that the pre-action disclosures sought against the AG are neither necessary nor relevant. The Plaintiffs' application for pre-action discovery and leave to serve pre-action interrogatories against the AG is therefore dismissed.

61 In any event, the applications brought by the 4th, 7th, 8th, 9th, 16th, 17th, 20th, 21st and 22nd Plaintiffs would have been dismissed since it is

undisputed that no correspondence was sought by the AG or forwarded by the SPS (see above at [7]).

62 I shall hear the parties' submissions on costs.

See Kee Oon
Judge of the High Court

Ravi s/o Madasamy (Carson Law Chambers) for the plaintiffs;
Tan Chee Meng SC, Leo Zhen Wei Lionel and Deya Shankar Dubey (WongPartnership LLP) for the first defendant;
Vergis S Abraham SC and Lau Hui Ming Kenny (Providence Law Asia LLC) for the second defendant.